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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA

14
15 PEOPLE OF THE STATE OF CALIFORNIA,
acting by and through San Francisco City
Attorney DAVID CHIU,

16 Plaintiff,

17 vs.

18 INCOMM FINANCIAL SERVICES, INC.;
TBBK CARD SERVICES, INC.; SUTTON
BANK; and PATHWARD N.A.,

19 Defendants.
20
21

Case No. 3:23-cv-06456-WHO

PLAINTIFF'S MOTION TO REMAND

| | |
|---------------|-------------------------|
| Hearing Date: | March 13, 2024 |
| Time: | 2:00 p.m. |
| Place: | Courtroom 2, 17th Floor |
| Trial Date: | N/A |

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

Please take notice that on March 13, 2024, at 2:00 p.m., Plaintiff the People of the State of California is scheduled to appear for oral argument in the courtroom of the Honorable William H. Orrick, at 450 Golden Gate Avenue, San Francisco, California, as necessary, to move this Court to remand this case under 28 U.S.C. section 1447(c).

The People respectfully request an order remanding this action in its entirety to the Superior Court of California, County of San Francisco for lack of subject matter jurisdiction. This motion is based on the accompanying Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

California law empowers certain public prosecutors, including the San Francisco City Attorney, to exercise the sovereign power of the State to pursue a lawsuit against any individual or business that harms the public through deceptive, unlawful, and unfair business practices. The California Legislature expressly authorized these public prosecutors to sue on behalf of the “People of the State of California” (“People”) under the Unfair Competition Law (UCL). Cal. Bus. & Prof. Code § 17204. Defendant’s Notice of Removal is the latest in a long line of failed attempts to invoke federal diversity jurisdiction in such a UCL suit brought on behalf of the People. *See* Notice of Removal, ECF No. 1 (“Notice”), at p. 2 (citing 28 U.S.C. § 1332(a)). Because public prosecutors exercise the State’s sovereign powers on behalf of the People, courts have consistently concluded that *the State* – not any particular city or county – is the plaintiff and real party in interest in these cases. And since the State is not a citizen of itself, and therefore can never be party to a federal diversity action, *see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 290 n.44 (1985), courts have promptly remanded such actions for want of diversity jurisdiction. This Court should do the same here.

Defendant does not dispute that this UCL action was filed on behalf of the People of the State of California to protect the public from the Defendants' alleged unlawful, unfair, and fraudulent business acts and practices. Rather, relying on *Department of Fair Employment and Housing v.*

1 *Lucent Technologies, Inc.*, 642 F.3d 728 (9th Cir. 2011), and *Nevada v. Bank of America Corp.*, 672
 2 F.3d 661 (9th Cir. 2012), Defendant contends that San Francisco – and not the State – is the real party
 3 in interest in this case. *See* Notice ¶¶ 22–28. To reach this erroneous conclusion, Defendant misreads
 4 *Lucent* and *Nevada*, misunderstands California law, and ignores numerous cases since *Lucent* and
 5 *Nevada* that continue a decades-long, uninterrupted pattern of recognizing that public prosecutors step
 6 into the shoes of the State when bringing UCL actions. If anything, *Nevada* expands on the principles
 7 first identified in *Lucent* to compel the conclusion that the People are the sole plaintiff and real party in
 8 interest in UCL cases like this one.

9 Defendant has not cited a single case where a California federal court exercised diversity
 10 jurisdiction in a UCL case brought on behalf of the People. This Court should not be the first to do so.
 11 There is no basis for diversity jurisdiction, and this Court should remand this case back to its proper
 12 forum in state court.

13 BACKGROUND

14 On November 9, 2023, Plaintiff, the People of the State of California, acting by and through
 15 San Francisco City Attorney David Chiu, brought suit in San Francisco Superior Court against
 16 InComm Financial Services, Inc. (“InComm”), as well as its three banking partners (“Bank
 17 Defendants”), TBBK Card Services, Inc., Sutton Bank, and Pathward N.A. (collectively,
 18 “Defendants”). The People’s Complaint alleges that InComm has engaged in unlawful, unfair, and
 19 fraudulent business acts and practices in violation of the UCL, Cal. Bus. & Prof. Code § 17200, by,
 20 among other reasons, negligently harming consumers in violation of California law requiring the
 21 exercise of ordinary care, Cal. Civ. Code § 1714(a); violating California’s law limiting consumers’
 22 liability for unauthorized debit card transactions, Cal. Civil Code § 1748.31; as well as violating
 23 California’s Consumer Legal Remedies Act, Cal. Civ. Code § 1770. Compl. ¶¶ 112–24. On
 24 December 14, 2023, InComm removed the action to this Court. *See* Notice ¶ 1.

25 InComm is a major provider of prepaid nonreloadable debit cards that it markets as “Vanilla
 26 cards.” Compl. ¶ 2. These cards are popular gifts, and are sold in San Francisco and throughout
 27 California at retailers like Safeway and Target. *Id.* ¶¶ 2, 10–12. For years, cardholders of Vanilla

1 debit cards have regularly discovered that shortly after activating the card – and often when going to
 2 use the card for the first time – the money put on the card is gone, and the balance is \$0. *Id.* ¶ 2.
 3 Hundreds of consumers have reported remarkably similar experiences: after having the card declined
 4 for insufficient funds, they learn the funds were spent by someone else – without the consumer’s
 5 permission, and before they ever had a chance to use the card. *Id.* InComm’s insufficient security
 6 practices are the direct cause of this widespread “card draining.” *Id.* ¶ 3. The packaging security for
 7 Vanilla cards is lax, and the cards lack other standard-practice security protocols that would prevent
 8 unauthorized access to the cards. *Id.* ¶¶ 3, 59–69. Despite thousands of consumer complaints and
 9 widespread coverage in the media over the years, InComm has done nothing to remediate the frequent,
 10 repeated, and unrelenting harm to consumers who buy or receive Vanilla cards. *Id.* ¶¶ 4, 69–73.

11 Worse still, neither InComm nor the Bank Defendants that serve as the issuers of these debit
 12 cards comply with their obligations under California law to reimburse Vanilla debit cardholders for
 13 unauthorized transactions. Compl. ¶ 5, 74–77. Numerous cardholders have reported InComm thwarts
 14 their reasonable efforts to obtain a refund. *Id.* ¶¶ 78–93. Vanilla cardholders are misled both about
 15 the security features of Vanilla debit cards and about InComm’s refund process, *id.* ¶¶ 94–103,
 16 resulting in significant harm to them, *id.*, ¶¶ 104–111. Vanilla debit cardholders across the State of
 17 California are among the thousands who have fallen victim to InComm and the Bank Defendants’
 18 unlawful, unfair, and fraudulent business practices. *Id.* ¶¶ 18–19, 41–42, 43(e), (f), (g) & (i), 106(c).

19 On December 14, 2023, InComm filed notice of removal to federal court, claiming as a basis
 20 diversity jurisdiction. *See* Notice at p. 2.

21 ARGUMENT

22 Although the sole Plaintiff in this case is the People, Compl. ¶ 8, InComm contends that
 23 complete diversity exists because each of the Defendants is a non-California citizen and the City and
 24 County of San Francisco (“San Francisco” or “the City”) is the “real party” in interest, and thus the
 25 “true plaintiff,” in this case. Notice ¶ 27. But the People are the only possible Plaintiff and real party
 26 at interest in this action. Because the People are an embodiment of the State – which is not a citizen of
 27 itself for diversity purposes – complete diversity does not exist, and this suit should be remanded.

I. DEFENDANTS BEAR THE BURDEN OF OVERCOMING THE PRESUMPTION AGAINST REMOVAL

Federal courts are courts of limited jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). A defendant may thus remove an action originally filed in state court only if the federal court would have had original jurisdiction over the subject matter of the action – that is, if the action either raises a federal question, or else meets the requirements for diversity jurisdiction. 28 U.S.C. §§ 1331, 1332(a), 1441(a)-(b); see also *Hunter v. Philip Morris USA*, 582 F.3d 1039, 1042–43 (9th Cir. 2009). As “[t]he party seeking to remove the case,” InComm “bears the burden of establishing that removal is proper.” *Trotta v. URS Fed. Servs., Inc.*, 532 F. Supp. 3d 985, 988 (D. Haw. 2021) (citing *Geographic Expeditions, Inc. v. Est. of Lhotka ex rel. Lhotka*, 599 F.3d 1102, 1106-07 (9th Cir. 2010)). The Ninth Circuit “strictly construe[s] the removal statute against removal jurisdiction,” rejecting federal jurisdiction “if there is any doubt as to the right of removal in the first instance.” *Acad. of Country Music v. Cont'l Cas. Co.*, 991 F.3d 1059, 1061 (9th Cir. 2021) (quoting *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir.1992)). This strict construction is “especially [important] in diversity cases, since concerns of comity mandate that state courts be allowed to decide state cases unless the removal action falls squarely within the bounds Congress has created.” *Phillips v. Allstate Ins. Co.*, 702 F. Supp. 1466, 1467–68 (C.D. Cal. 1989).

Notably, InComm does not claim that this action raises a federal question. Nor could it, as the People's UCL claims arise solely under California law. Compl. ¶¶ 118–24. InComm's only purported basis for removal is diversity jurisdiction. Notice ¶ 12.

II. REMOVAL IS IMPROPER BECAUSE DEFENDANTS CANNOT ESTABLISH ANY BASIS FOR DIVERSITY JURISDICTION

A federal court has diversity jurisdiction over “all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between . . . citizens of different States.” 28 U.S.C. § 1332(a). The rule requires complete diversity – *i.e.*, every plaintiff must be diverse from every defendant. *Hunter*, 582 F.3d at 1043.

Even if all Defendants are non-California citizens, diversity does not exist where, as here, the sole Plaintiff in the case – the People of the State of California – is not a citizen of California, and therefore cannot sue or be sued in a federal diversity action.

A. Because the People of the State of California Is the Sole Plaintiff in This Case, Diversity Jurisdiction Does Not Exist.

The California Legislature has granted certain public prosecutors, including certain city attorneys, authority to enforce California's UCL on behalf of the People of the State of California. *See Cal. Bus. & Prof. Code § 17204.*¹ These prosecutors share sovereign enforcement authority granted under the UCL with the California Attorney General. *Id.; Lavie v. Procter & Gamble Co.*, 105 Cal. App. 4th 496, 503 (Cal. App. 2003); *Cal. Or. Power Co. v. Superior Court of Cal.*, 45 Cal. 2d 858, 871 (Cal. 1956). In exercising this authority, city attorneys act on behalf of the People – *not* on behalf of their individual municipalities. *See People v. Pac. Land Research Co.*, 20 Cal. 3d 10, 17 (Cal. 1977); *People v. Lim*, 18 Cal. 2d 872, 878 (Cal. 1941). This “broad grant of authority” to public prosecutors also empowers them to seek injunctive relief, civil penalties, and restitution on a statewide basis. *Abbott Lab'y's v. Superior Ct. of Orange Cnty.*, 9 Cal. 5th 642, 664 (Cal., 2020).

1. The People are the only possible plaintiff in civil law enforcement actions brought by public prosecutors under California's UCL.

The only Plaintiff in this suit is the People of the State of California, acting by and through San Francisco City Attorney David Chiu. Compl. ¶ 8. Nonetheless, InComm argues that San Francisco is the real plaintiff in this action, because this case is being prosecuted by the City Attorney for the City and County of San Francisco.

¹ Defendant argues that “the Complaint fails to articulate a basis under California law for the [San Francisco] City Attorney to bring this suit on behalf of the state under the UCL.” Notice ¶ 20. Defendant appears to misunderstand how the UCL confers enforcement authority upon the San Francisco City Attorney. Defendant dedicates several paragraphs to its unsubstantiated speculation – accompanied by an almost year-old *Axios* article – that San Francisco may not meet the UCL’s 750,000-population threshold requirement enforcement provision, *id.* ¶ 21 (citing Cal. Bus. & Prof. Code § 17204), as well as that the City and County has not “allege[d] any facts to demonstrate compliance with such provisions.” *Id.* ¶ 20. But the very next clause of UCL Section 17204 makes clear that UCL cases can be filed on behalf of the People by the “city attorney in a city and county” such as the City and County of San Francisco. Cal. Bus. & Prof. Code § 17204 (emphasis added).

1 InComm is wrong. The People did not bring this case to vindicate the rights of the City and
 2 County of San Francisco. San Francisco is not pursuing any claims on its own behalf or seeking any
 3 relief that inures to the benefit of the City as an entity. Instead, the People – acting by and through
 4 their statutorily-authorized representative – have filed this action to protect the general public. *See*
 5 *Pac. Land Research Co.*, 20 Cal. 3d. at 17 (UCL action brought by public prosecutor is “designed to
 6 protect the public”). This action is therefore treated as if it had been brought by the State itself. *See*
 7 Cal. Gov. Code § 100 (“The sovereignty of the state resides in the people thereof, and all writs and
 8 processes shall issue in their name. . . . The style of all processes shall be ‘The People of the State of
 9 California,’ and all prosecutions shall be conducted in their name and by their authority.”); *People of*
 10 *the State of Cal. v. Glen Arms Estate, Inc.*, 230 Cal. App. 2d 841, 854 n.10 (Cal. App. 1965) (in a civil
 11 action brought by the People through a local representative, “the sovereignty of the state is in the
 12 people . . . , the ‘People of the State’ and ‘The State’ being descriptive of the same sovereignty”
 13 (citations omitted)).

14 Accordingly, and because it is well established that “a State is not a citizen of itself for
 15 [diversity] purposes,” *Atascadero State Hosp.*, 473 U.S. at 290 n.44, the requirement that the case be
 16 “between . . . citizens of different states” is not satisfied in UCL cases brought by the People. *See also*
 17 *Moor v. Alameda Cnty.*, 411 U.S. 693, 717 (1973) (A California county is not a “a citizen of the State
 18 for diversity purposes” when acting as ““the arm or alter ego of the State”” rather than “political
 19 subdivision of a State.”).

20 **2. Federal courts in California have consistently declined to exercise diversity
 21 jurisdiction over civil law enforcement actions brought by public
 22 prosecutors on behalf of the People under the California UCL.**

23 Because suits brought on behalf of the People are synonymous with an action brought by the
 24 State, federal courts have consistently remanded public prosecutions brought to enforce the UCL when
 25 removed solely on diversity jurisdiction grounds. *People of the State of California v. Steelcase, Inc.* is
 26 exemplary of the many cases where courts have recognized that because the UCL “expressly
 27 authorizes this action to be prosecuted in the name of the People,” the People – not the city or county
 28 whose public prosecutor filed the action on the People’s behalf – are “the proper party plaintiff and the

1 real party in interest.” 792 F. Supp. 84, 85–86 (C.D. Cal. 1992), overruled on other grounds by *Cal. ex
2 rel. Lockyer v. Dynegy, Inc.*, 375 F.3d 831, 849 (9th Cir. 2004). *Steelcase* recognized the lack of
3 federal jurisdiction because “[t]he People are the same party as the State of California,” and “a state is
4 not a citizen of itself [and] [t]herefore . . . cannot sue or be sued in a diversity action.” *Id.* at 86. In the
5 decades following *Steelcase*, numerous district courts reached the same conclusion. *See Cnty. of Santa
6 Clara ex rel. Marquez v. Bristol Myers Squibb Co.*, No. 12-CV-03256-EJD, 2012 WL 4189126, at *3-
7 4 (N.D. Cal. Sep. 17, 2012); *People of the State of Cal. v. Universal Syndications, Inc.*, No. 09-1186-
8 JF, 2009 WL 1689651, at *5 (N.D. Cal. Jun. 16, 2009); *People of the State of Cal. v. Time Warner,
9 Inc.*, No. 08-4446-SVW, 2008 WL 4291435, at *2–3 (C.D. Cal. Sep. 17, 2008); *People of the State of
10 Cal. v. Check ‘N Go of Cal., Inc.*, No. 07-2789-JSW, 2007 WL 2406888, at *5–7 (N.D. Cal. Aug. 20,
11 2007).

12 **3. The Court lacks diversity jurisdiction under the very principles set forth in
Lucent and *Nevada*.**

13 Despite the many cases recognizing the State as the real party in interest when a public
14 prosecutor brings a UCL case on behalf of the People, InComm contends that San Francisco – and not
15 the State – is the real party in interest in this case. Notice ¶ 27. Defendant suggests, but does not (and
16 cannot) state, that the numerous federal court decisions remanding on this basis before *Lucent* and
17 *Nevada* somehow erred by declining to exercise diversity jurisdiction on the ground that the People in
18 such actions are the real party in interest. Notice ¶ 23. But neither *Lucent* nor *Nevada* upsets the
19 consistent finding, across several decades before and after those decisions, that the real party in
20 interest in a UCL action brought by and through a public prosecutor is the People. If anything, the
21 principles distilled from both cases support that finding, including here.

22 **a. *Department of Fair Employment and Housing v. Lucent***

23 Defendant’s assertion depends on a fundamental misreading of *Lucent*. *Lucent* involved a
24 claim under California’s Fair Employment and Housing Act (“FEHA”), which authorizes California’s
25 Department of Fair Employment and Housing to pursue actions even on behalf of a *single aggrieved
employee*. 642 F.3d at 735. *Lucent* did not address, much less mention, California’s UCL statute,
27 which expressly authorizes public prosecutors to bring civil law enforcement actions “in the name of

1 the people of the State of California.” Cal. Bus. & Prof. Code § 17206(a). Indeed, in a striking
 2 contrast to the UCL, the FEHA sets forth clearly that “the person claiming to be aggrieved shall be the
 3 real party in interest” even where the action is brought by the Department. *Lucent*, 642 F.3d at 739
 4 (citing Cal. Gov’t Code § 12965(c)(2)). *Lucent*’s central inquiry is “what interest California has in this
 5 litigation pursuant to its laws,” *id.* at 738, and all it stands for is the uncontroversial proposition that a
 6 state’s ordinary, generalized interest in ensuring compliance with its laws is insufficient to confer real
 7 party status. Rather, “a State’s presence in a lawsuit will defeat [diversity] jurisdiction . . . only if the
 8 relief sought is that which injures to it.” *Id.* at 737 (quotation marks and citation omitted). Applying
 9 these principles, the Ninth Circuit in *Lucent* held that the State was not the real party in interest in the
 10 employment action filed by the Department on behalf of a single aggrieved employee, as any
 11 judgment in that single employee’s favor would operate to *his* benefit. *Id.* at 738–39.

12 There is a stark difference between the action at issue in *Lucent* to direct benefits to a single
 13 plaintiff and the civil law enforcement action brought by the People here seeking law enforcement
 14 civil penalties and statewide injunctive relief for all impacted members of the public.² And here, in
 15 contrast to the FEHA, California courts have long recognized that the State’s interest in enforcing its
 16 consumer protection laws is an especially “compelling interest” – indeed, “an exigency of the utmost
 17 priority.” *People of the State of Cal. v. Superior Court (Olson)*, 96 Cal. App. 3d 181, 191 (Cal. App.
 18 1979) (quotation marks and citation omitted). There is no dispute under California law that these
 19 interests may be secured by local public prosecutors acting on behalf of the People of the State.

20 The People’s complaint more than sufficiently establishes these interests. It explains that
 21 InComm’s knowing, decade-long practice of employing insufficient security features with its
 22 nonreloadable Vanilla debit cards has resulted in harm to numerous defrauded Vanilla cardholders
 23 across California. Compl. ¶¶ 18–19, 41–42. This harm is exacerbated by InComm’s misleading
 24 claims to consumers about its security practices and offer of refunds for unauthorized transactions,
 25 while in practice InComm and the Bank Defendants that issue its cards have failed to refund

27 ² The California Supreme Court recently and unanimously made clear that the UCL permits
 28 public prosecutors to seek monetary relief on a statewide basis. *Abbott Lab.’ys*, 9 Cal. 5th at 658.

1 cardholders for unauthorized transactions as required by California law. *Id.* ¶¶ 19, 74–93. The
 2 People’s complaint alleges that citizens across California have repeatedly fallen victim to InComm’s
 3 false, misleading, and fraudulent business practices. *E.g., id.* ¶¶ 43(e), (f), (g) & (i), 106(c). And it
 4 highlights that literally *thousands* of consumers have filed complaints with consumer advocacy
 5 websites BBB, *id.* ¶ 46, Consumer Affairs, *id.* ¶ 47, and Complaints Board, *id.* ¶ 48. The State of
 6 California therefore has a compelling interest in this litigation to enforce and uphold its consumer
 7 protection laws. The People’s complaint easily clears *Lucent*’s bar to show “what interest California
 8 has in this litigation pursuant to its laws.” 642 F.3d at 738.

9 **b. *Nevada v. Bank of America Corp.***

10 *Nevada* does not change the diversity-jurisdiction analysis, either – if anything, it reaffirms it.
 11 In *Nevada*, the Nevada Attorney General sued under the Nevada Deceptive Trade Practices Act to
 12 “protect the hundreds of thousands of homeowners in the state allegedly deceived” by the defendant’s
 13 mortgage lending practices. *Nevada*, 672 F.3d at 670. Distinguishing its holding from *Lucent*, the
 14 Ninth Circuit recognized that the “rationale for finding that the aggrieved individual was the real party
 15 in interest in *Lucent* compels the conclusion that Nevada is the real party in interest here,” thereby
 16 defeating diversity. *Id.*

17 Every factor cited by the *Nevada* court to reach this conclusion supports a similar finding that
 18 the People are the real party in interest here. *First*, just as *Nevada* brought suit “pursuant to its
 19 statutory authority under the DTPA because of its interest in protecting the integrity of mortgage loan
 20 servicing,” 672 F.3d at 670, here, the City Attorney filed suit pursuant to the statutory authority under
 21 the UCL because of the State’s interest in protecting the integrity of the debits cards consumers
 22 purchase at retailers located across the state. Compl. ¶¶ 31–32, 112–17. *Second*, Nevada had a
 23 “specific, concrete interest in eliminating any deceptive practices that may have contributed to” the
 24 mortgage crisis’s devastating impact on Nevada residents, 672 F.3d at 670 – an interest akin to the
 25 State’s interest here in protecting its citizens from unlawful, unfair, and fraudulent business practices
 26 that have resulted in unrecouped financial losses for thousands of cardholders. Compl. ¶¶ 42–49.

27 *Third*, the Ninth Circuit pointed to Nevada’s pursuit of civil penalties, a form of relief “available to it

1 alone,” 672 F.3d at 671–72, something equally true here. *See* Cal. Bus. & Prof. Code § 17206(a)
 2 (permitting civil penalties in law enforcement actions). *Fourth*, it also highlighted Nevada’s claim for
 3 injunctive relief that could be obtained under a standard only applicable in lawsuits brought by a
 4 public prosecutor. *Id.* at 672. Here, too, a similarly deferential injunctive-relief standard applies. *See*
 5 *People ex rel. Feuer v. FXS Mgmt., Inc.*, 2 Cal. App. 5th 1154, 1158 (Cal. App. 2016) (“When the
 6 plaintiff is a governmental entity seeking to enjoin illegal activity, a more deferential standard
 7 applies.”). *Last*, the court confirmed that Nevada’s claim for restitution for injured consumers did not
 8 diminish the state’s sovereign interest in the action. 672 F.3d at 671. The same is true here. *See* Cal.
 9 Bus. & Prof. Code §§ 17204, 17206(a); *Pac. Land Research Co.*, 20 Cal. 3d. at 19 (the People’s UCL
 10 action is “fundamentally for the benefit of the public” even when seeking restitution); *see also e.g.*,
 11 *People of the State of Cal. v. Purdue Pharma L.P.*, No. SACV 14-1080-JLS (DFMx), 2014 WL
 12 6065907, at *4 (C.D. Cal. Nov. 12, 2014) (applying *Nevada* and ordering remand of public
 13 prosecutors’ UCL action seeking restitution for individual consumers). Every factor identified in
 14 *Nevada* is therefore present here, and just as the Ninth Circuit accordingly remanded for want of
 15 diversity jurisdiction, so too should the Court here.

16 **B. Since *Lucent* and *Nevada*, District Courts Have Repeatedly Found Diversity
 17 Jurisdiction Lacking in Actions Brought by Public Prosecutors on Behalf of the
 People.**

18 InComm invokes *Lucent* and *Nevada* as if they were watershed decisions casting doubt on the
 19 numerous cases upholding the authority of public prosecutors to bring UCL actions on behalf of the
 20 People as the real-party-in-interest. *See* Notice, ¶¶ 20, 24–26. However, after those cases were
 21 decided – just as before – district courts have consistently denied diversity jurisdiction where public
 22 prosecutors bring suit under their UCL or related statutory public prosecutor powers. Indeed, many
 23 courts have *relied on Lucent* and *Nevada* for support in remanding actions removed on diversity
 24 grounds that were precisely like the People’s suit here. For example, in *Purdue Pharma*, a suit
 25 brought by and through the Orange County District Attorney and the Santa Clara County Counsel, the
 26 district court found that “*Lucent* and *Nevada* compel the conclusion that the People of the State of
 27 California – and therefore the State itself – are the real party in interest in . . . UCL and FAL actions

1 brought by local prosecutors.” 2014 WL 6065907 at *3 (emphasis added). In similar fashion, in
 2 *California v. HomeAway.com, Inc.*, the district court found that in a suit brought by and through the
 3 Los Angeles City Attorney, the State was the real party in interest. No. 2:22-CV-02578-FLA (JPRx),
 4 2023 WL 2497862, at *2 (C.D. Cal. Mar. 14, 2023). Just as in *Nevada*, the district court in
 5 *HomeAway.com* pointed to the numerous factors – all also present here – supporting that finding,
 6 including: (1) the city attorney’s civil enforcement authority to bring UCL actions, *id.*; (2) the public’s
 7 “substantial and specific interest in enforcing consumer protection laws,” *id.* at *3; (3) that the plaintiff
 8 sought relief “for the State in the form of statutory penalties and an injunction under the UCL,” *id.*;
 9 and (4) that “all such civil penalties must be exclusively (and uniquely) devoted to advance a State
 10 interest – the enforcement of consumer protection laws,” *id.*

11 Numerous other decisions since *Lucent* and *Nevada* have similarly remanded suits brought by
 12 and through public prosecutors to enforce the UCL and related statutes protecting the public. *See, e.g.,*
 13 *Cnty. of San Mateo v. Monsanto Co.*, 644 F. Supp. 3d 566, 571 (N.D. Cal. 2022) (finding the People
 14 was the real-party-in-interest in public nuisance suit brought by and through County of San Mateo);
 15 *The People of the State of Cal. by & through Los Angeles City Att’y v. Monsanto Co.*, No. 2:22-CV-
 16 02399-ODW (SKXx), 2022 WL 2355195, at *3 (C.D. Cal. June 30, 2022) (same, as to public nuisance
 17 suit brought by and through Los Angeles City Attorney); *Cnty. of Santa Clara v. Wang*, No. 5:20-CV-
 18 05823-EJD, 2020 WL 8614186, at *2 (N.D. Cal. Sept. 1, 2020) (same, as to public nuisance suit
 19 brought by and through County of Santa Clara); *see also Washington v. Facebook, Inc.*, No. C18-
 20 1031JLR, 2018 WL 5617145, at *2 (W.D. Wash. Oct. 30, 2018) (same, as to Washington fair
 21 campaign practices suit seeking civil penalties and injunctive relief brought by and through
 22 Washington Attorney General); *In re Facebook, Inc., Consumer Priv. User Profile Litig.*, 354 F. Supp.
 23 3d 1122, 1131 (N.D. Cal. 2019) (same, as to Illinois consumer fraud suit seeking civil penalties and
 24 injunctive relief brought by and through Illinois county prosecutor); *Hawaii, ex rel. Louie v. Bristol-*
 25 *Myers Squibb Co.*, No. 14-00180-HG-RLP, 2014 WL 3427387, at *9 (D. Haw. July 15, 2014) (same,
 26 as to unfair-competition and elder-consumer-fraud suit brought by Hawaii). Notably, Defendant’s
 27 Notice does not identify a single case that holds otherwise, before or after *Lucent* and *Nevada*.

28

1 **C. Pursuing UCL Civil Penalties Does Not Create Diversity Jurisdiction.**

2 InComm also erroneously asserts that the City and County San Francisco must be the “real
 3 party in interest” because the People seek civil penalties as among the forms of relief public
 4 prosecutors are empowered to pursue under the UCL. *See* Notice ¶ 28. In particular, InComm
 5 wrongly charges that San Francisco “stands to unilaterally reap the rewards of the suit” because it will
 6 “receive *all* of the civil penalties collected as a result of the suit.” *Id.* (emphasis in original).

7 InComm is hardly the first defendant to raise this canard in an unsuccessful effort to justify
 8 diversity jurisdiction. Critically, InComm ignores that any penalties recovered in this case will not go
 9 into San Francisco’s general fund for the City’s own use. To the contrary, the penalties may only be
 10 used “by the city attorney for the enforcement of consumer protection laws,” Cal. Bus. & Prof. Code
 11 § 17206(f), and therefore advance the State’s – not only San Francisco’s – interest. Accordingly, as
 12 other courts that have rejected identical arguments to InComm’s have held, it is “immaterial that the
 13 City would receive relief in this action because such relief would be dedicated to enforcing the State’s
 14 consumer protection laws, and advance the interests of the State.” *HomeAway.com*, 2023 WL
 15 2497862, at *3; *see also Purdue Pharma*, 2014 WL 6065907, at *3 (“While Defendants note that civil
 16 penalties paid under the UCL and FAL will go to the Orange and Santa Clara County treasuries – not
 17 to the State – this is immaterial in light of the fact that any recovery may be used only for the future
 18 enforcement of California’s consumer protection laws, thereby furthering the interests of the State, not
 19 the Counties.”); *In re Facebook, Inc.*, 354 F. Supp. 3d at 1134 (“[T]he purpose of a civil penalty is not
 20 to compensate a victim but to punish the wrongdoer and deter future wrongdoing by others. Thus,
 21 from a punishment and deterrence standpoint, it serves the interests of the statute . . . equally whether
 22 the penalties end up in [the] state or county treasury.”). In short, the fact that San Francisco may
 23 receive civil penalties in this case does not make the City the real party interest or create diversity
 24 jurisdiction.³

25 ³ Similarly irrelevant are InComm’s attempts to cast doubt on the veracity of the People’s
 26 allegations concerning the harm to consumers in California. *See* Notice ¶¶ 25–26. Whether a
 27 particular consumer received a refund has no bearing on whether diversity jurisdiction exists here.
 28 And, because this is a law enforcement action, Plaintiff is not required to allege harm, although it
 plainly does (*see* Compl. ¶¶ 104–111). *See People v. E.W.A.P. Inc.*, 106 Cal. App. 3d 315, 319 (Cal.
 App. 1980) (where a practice is unlawful, “[i]t is not necessary for the People additionally to allege

CONCLUSION

Because the People are not a citizen of any state for purposes of diversity jurisdiction, the People respectfully request that the Court enter an order remanding the action in its entirety to the Superior Court of California of the County of San Francisco.

Dated: January 30, 2024

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that it is . . . harmful to the consumer"); Cal. Bus. & Prof. Code § 17204 (differentiating between city attorneys, who do not need to show injury, and private parties, who must have "lost money or property as a result of the unfair competition"). Of course, even if allegations of harm were required, InComm's factual arguments are premature at this stage.